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IN THE

SUPREME COURT of the UNITED STATES

JANUARY 24, 1974

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NO. 73-1048

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DR. N. JAY ROGERS

Petitioner

VS.

DR. JACK BURTON, ET AL.

Respondent

• • •

STATEMENT OF RESPONDENTS OPPOSING JURISDICTION AND MOTION TO DISMISS

• • •

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STATEMENT OF RESPONDENTS OPPOSING JURISDICTION AND MOTION TO DISMISS

NATURE OF THE CASE

The only issue involved in this case is whether under the facts Petitioner is entitled to the exemptions contained in the Texas Optometry Act (Article 4552-1, et seq., Revised Civil Statutes of Texas).

STATEMENT, ARGUMENT AND AUTHORITIES

The Controlling Lease and Subleases Were Not In Effect on April 15, 1969.

The undisputed evidence in this case, as found by the Trial Court, the Texas Court of Civil Appeals, and the Texas Supreme Court, reveals that Petitioner and his brothers were attempting to evade and circumvent the provisions of the Texas Optometry Act (Article 4552-1, Revised Civil Statutes of Texas) which provides certain exemptions for optometrists occupying premises under leases in effect on April 15, 1969.

Prior to the cut-off date of April 15, 1969, the landowner leased the premises in question to Rogers Bros., Inc., a corporation owned and controlled by Petitioner and his brothers. The original base lease from the landowner terminated on June 30, 1971, and was the only lease in effect on April 15, 1969. The landowner executed a second base lease to Rogers Bros., Inc., bearing date of December 1, 1968, for an eight-year period beginning July 1, 1971. After the execution of the second base lease, the lessee, Rogers Bros., Inc., attempted to sublease the premises to Rogers Bros., a partnership consisting of Petitioner and his brothers. Thereafter, said partnership attempted to sublease the premises to Petitioner and his brother, Dr. S. J. Rogers, doing business as Texas State Optical. The second base lease from the landowner and the two subleases all were dated December 1, 1968. However, the undisputed testimony of the real estate agent who negotiated both base leases with the landowner and the correspondence between the real estate agent and the lessees conclusively proved that the second base lease from the landowner to begin on July 1, 1971, was not executed by the parties until after April 15, 1969. The two subleases in question referred to and were based on the second base lease and, consequently, could not have been executed by the parties until after the cut-off date of April 15, 1969.

Under the facts of this case Petitioner was not entitled to the exemptions afforded by the Texas Optometry Act.

The State courts correctly held that the right of possession of a sublessee, as against the original lessor, terminates with the expiration of the original lease. *Sinclair Refining Co. v. Womack*, 66 S.W.2d 402, 405 (Tex.Civ.App. 1933, no writ). It is clear that the lease contemplated by the provisions of the Texas Optometry Act was the base or controlling lease from the landowner. Under the facts of the case the Petitioner's right to the exemptions in question terminated on the expiration of the term of the first base lease from the landowner which was the only lease in effect on April 15, 1969.

Further, as found by the State courts, it is undisputed in the record that the Texas Optometry Board has consistently used the base lease, being the original lease between the owner and his lessee, as the instrument referred to in the exemption statute, and that all optometrists in this State, except those associated with the Texas State Optical, adopted and used the Board's precept that the base lease was controlling of the exemption. If the meaning of a statute is doubtful or the language ambiguous, the construction placed on the statute, followed by consistent adherence to such construction, by an administrative agency of the State charged with administration of the enactment is entitled to weight with the courts. *Calvert v. Kadane*, 427 S.W.2d 605, 608 (Tex.Sup. 1968); *Heard v. City of Dallas*, 456 S.W.2d 440, 444 (Tex.Civ. App. Dallas, 1970, writ ref. n.r.e.); *Tarry Moving and Storage Co. v. Railroad Commission*, 359 S.W.2d 62, 67 (Tex.Civ.App. Austin, 1962, affmd. 367 S.W.2d 322).

No Federal Question

There was no contention by Petitioner in the State District Court, in the Texas Court of Civil Appeals, or in his Application for Writ of Error filed in the Texas Supreme Court that any federal question was involved in this case. The Petitioner may not now try to inject a federal constitutional question in this case since he failed to preserve this issue in the State courts.

In *Chalk Hill Theatre Co. Ltd., vs. F. S. Gambrell*, 205 S.W.2d 126 (Tex.Civ.App. 1947, ref. n.r.e., appeal dismissed 68 S.Ct. 1071, 334 U.S. 814, 92 L.Ed. 1745), the U. S. Supreme Court held that Petitioner had failed to raise any federal question in the State courts and in dismissing the appeal stated:

> "The motions to dismiss are granted and the appeal is dismissed for the reason that the judgment below is based upon a non-federal ground adequate to support it." (334 U.S. 814)

The long established general rule is that an attempt to raise a federal question after judgment upon a petition for rehearing comes too late unless the court actually entertains the question and decides it. *Herndon v. State of Georgia*, 295 U.S. 441, 443; *McCorquodale v. Texas*, 211 U.S. 432; *El Paso & S.W. Ry. Co. vs. Eichel & Weikel*, 226 U.S. 590; *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U.S. 341.

In *Gibbes v. Zimmerman*, 290 U.S. 326, 54 Sup. Ct. 140 (1933) the Court stated as follows:

> "The appellant says the act of March 9 arbitrarily deprives him of a remedy for the enforcement of stockholder's liability, which remedy was his property, and was taken from him without due process. But although a vested cause of action is property and is protected from arbitrary interference, the applicant has no property in the constitutional sense. In any particular form of remedy, all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure."

There is no substantial federal question in this case and the appeal should be dismissed.

CONCLUSION

The undisputed evidence shows that Petitioner is not entitled to the exemptions contained in the Texas Optometry Act since the lease and subleases in question were not in effect on April 15, 1969, and there is no constitutional federal question presented by this case.

PRAYER

Respondents respectfully pray that the Petition for a writ of certiorari be denied and that this appeal be dismissed.

Respectfully submitted,

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/Signed/ Jack Sparks
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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

Copies of the above and foregoing Statement of Respondents Opposing Jurisdiction and Motion to Dismiss are being furnished C. M. Bradford, Beaumont, Texas, McGinnis, Lochridge & Kilgore, Texas State Bank Building, Austin, Texas, and Mehaffy, Weber, Keith & Gonsoulin, 1400 San Jacinto Bldg., Beaumont, Texas, by placing copies in the U. S. mail, postage prepaid.

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